No. 91-212

In The

Supreme Court of the United States

October Term, 1991

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ROTH FARMS, INC. and K.W.B. FARMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

FLORIDA KEYS CITIZEN COALITION, FLORIDA WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB, NATIONAL WILDLIFE FEDERATION, WILDERNESS SOCIETY, NATIONAL PARKS & CONSERVATION ASSOCIATION, DEFENDERS OF WILDLIFE, FLORIDA AUDUBON SOCIETY and TREASURE COAST ENVIRONMENTAL COALITION,

SOUTH FLORIDA WATER MANAGEMENT DISTRICT and TIMER E. POWERS, its Interim Executive Director, FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION and CAROL M. BROWNER, its Secretary,

FLORIDA SUGAR CANE LEAGUE, INC., FLORIDA FRUIT and VEGETABLE ASSOCIATION, BEARDSLEY FARMS, INC., CITY OF BELLE GLADE, and CITY OF CLEWISTON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ROTH FARMS INC., and K.W.B. FARMS

ROBERT P. SMITH

123 South Calhoun Street (32301)
Post Office Box 6526
Tallahassee, Florida 32314
(904) 222-7500

Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPPLEMENTAL BRIEF OF PETITIONERS

This brief calls to the Court's attention, Rule 15.7, two litigation events occurring since we petitioned for writ of certiorari – "intervening matter not available at the time of the party's last filing" – which bear on the Court's decision to review, or not, the Eleventh Circuit decision refusing to take up and decide the Article III jurisdictional question that we and others raised there in bar of any federal adjudication of this claim.

The central issue in Questions 2, 3 and 4 is whether the Case-or-Controversy limitation in Article III excludes as nonjusticiable a federal court suit in the name of the United States against a State, not consented to by any clear statement of State statute, nor founded in any clear statement of the Constitution, or Act of Congress, or contract with the State, to compel the State to adopt and enforce a regulatory code implementing general statutory policy of the State in a manner deemed by a federal judge to satisfy proprietary interests of the United States.

Of course, Questions 2, 3 and 4 are impotent if no federal court need decide them. Federalism as embodied in the structure of the Constitution, and in Article III, requires a judicial voice; it is not self-vindicating. Question 1 is whether a United States court of appeals must decide such jurisdictional questions when they are raised in a pending case.

Now the district court as well, acting on the mandate, refuses to consider any question of its want of jurisdiction.

As our petition has shown, the court of appeals declared, "We decline to consider this motion" –

petitioners' Suggestion and Motion as to Lack of Jurisdiction – after refusing to consider, as well, a tendered amicus suggestion of "lack of jurisdiction in this and the district court for want of a justiciable case or controversy" (Pet. A23).

The court of appeals ordered, "The Farm Interests may still seek to present their jurisdictional motion to the District Court" (Pet. A24).

While petitioning this Court, we also filed in the district court on remand a comprehensive Suggestion of Lack of Article III Jurisdiction. On August 22, 1991, on motion by the United States, the district court ordered that Suggestion *stricken*: "Order Granting United States' Motion to Strike the Suggestion of Lack of Article III Jurisdiction by Intervenor Defendants Farm Bureau, Roth Farms, K.W.B. Farms." Supp. A1 et seq., appended to this brief.

The district court's order is understandable, perhaps, in light of a court of appeals mandate which so discourages any contest of the federal judicial power in the premises. "If they choose this step," the court of appeals said of petitioners renewing their Article III challenge in the district court, petitioners "will be well advised to ask the District Court's permission first" (Pet. A24).

The mandate then added further advice to the district court itself: "the District Court may condition the Farm Interests' intervention in this case on such terms as will be consistent with the fair, prompt conduct of this litigation" and may "dispose in summary fashion (as we have done here) of any motions that the Farm Interests may

file beyond the scope of their right to participate in these proceedings" (Pet. A24).

So in ordering our Suggestion *stricken*, refusing to consider it at all, the district court stated (Supp. A1) that the court of appeals had *denied* the jurisdictional objection in that court: "In denying this motion, the Eleventh Circuit stated . . . . " (Supp. A2).

The district court further declared that petitioners' "broad attack on the Court's jurisdiction over the entire underlying proceeding . . . greatly exceeds the limited scope of intervention granted by the Eleventh Circuit," described as a limited "right to participate in the development of numeric water quality standards" to be promulgated and enforced by State regulation (Supp. A2).

These events dramatize the importance of the questions now presented for certiorari review.

Heretofore this Court has prescribed a rule "inflexible and without exception" as regards the necessity that federal courts ferret out and resolve any doubt about their Article III jurisdiction – whether the parties protest it, agree to it, acquiesce, stand silent, or whatever. Describing that necessity as "springing from the nature and limits of the judicial power of the United States," the Court expounded its rule "inflexible and without exception" in *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) and *Insurance Corp., of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702 (1982), among other decisions previously cited.

This rule admits no exception whereby a federal court protects itself from inquiring as to its want of

jurisdiction by muzzling the parties litigant. This litigation, after all, seeks a federal judicial decree that the State promulgate more aggressive State regulation, under State law, of the Farm Interests whose farming is decried in the complaint (Am. Compl. ¶¶ 13 et seq., Pet. A38 et seq.). Shall these federal courts by confining petitioners to "participat[ing] in the development of numeric water quality standards" – a State law process that petitioners insist cannot lawfully be seized, performed or coerced by a federal court – then foreclose any effective contest of this arrogation of power?

The district court's action on the mandate illuminates the court of appeals decision presented for review and directly puts in jeopardy this Court's decision in *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76, 77 (1988), where this Court gave voice even to a *nonparty* affected by the proceedings below – a witness, held in contempt – to contest the federal court's subject matter jurisdiction of the underlying case:

> Once the right to appeal a civil contempt order is acknowledged, arguments in its legitimate support should not be so confined that the power of the issuing court remains untested. . . .
>
> The challenge in this case goes to the subject-matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very

> wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority.

The district court's action on the mandate is significant for the further reason that it wrongly attributes *res judicata* effect to the court of appeals' refusal to consider the issue of its jurisdiction. *Res judicata* no more justifies the district court in evading the issue than it justifies the court of appeals in reasoning, similarly, that (Pet. A25) "the Farm Interests are adequately represented on the jurisdictional issues by the defendants South Florida Water District and Florida Department of Environmental Regulation, which have already raised many of these issues with the District Court." Even had the Florida agencies contested the district court's jurisdiction as do petitioners (they didn't), and even if they were petitioners' privies (they weren't), no nonfinal district court affirmation of jurisdiction could excuse the court of appeals from deciding the issue. *Res judicata* cannot foreclose even collateral attacks, let alone direct linear attacks on appeal, without affording an opportunity, in the court of last resort, to contest subject matter jurisdiction. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites,* 456 U.S. 694, 702 fn. 9 (1982), and cases cited.

Even here the Florida agency parties are silent as to this federal court coercion of sovereign State functions.

The Court will have taken note that the two Florida agency defendants have thus far stood silent in this Court. They were passive, as well, in the court of appeals.

It adds to the importance of this Court's vigilance over Article III, we submit, when agents of a sovereign State are neither here nor there on whether, as the court of appeals put it, "the state is not doing its job and statutory authority supports federal proceedings" (Opinion, 922 F.2d at 709 fn. 7, Pet. A 11 fn. 7):

> Viewed from a different angle, Count I of the Complaint seeks to move a state administrative task – development of standards for implementing the broad commands of the [Florida] SWIM Act – to federal court. If the state is not doing its job and statutory authority supports federal proceedings.

No federal court has yet inquired whether "statutory authority supports federal proceedings." The courts below are all too satisfied, however, to inquire whether "the state is not doing its job" under State law.

The federal judicial proceedings below are coercive of a sovereign State function. The State administrative process is by State design free of federal judicial coercion. The only possible justification for such coercion is superseding jurisdiction under Article III. Two courts below have refused to address that issue.

To preserve uniformity in this Court's supervision of the lower federal courts exercising Article III powers and obeying its limitations, this case should be taken for review.

Respectfully submitted,

ROBERT P. SMITH
123 South Calhoun Street (32201)
Post Office Box 6526
Tallahassee, Florida 32314
(904) 222-7600

Counsel of Record for Petitioners

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 88-1886-
CIV-HOEVELER

UNITED STATES OF AMERICA,
et al.,

Plaintiffs,

vs.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT; TIMER
E. POWERS, Interim Executive
Director, South Florida
Water Management District;
FLORIDA DEPARTMENT OF
ENVIRONMENTAL REGULATION;
and CAROL M. BROWNER,
Secretary, Florida Department of
Environmental Regulation,
et al.,

Defendants.

ORDER GRANTING UNITED STATES' MOTION TO STRIKE THE SUGGESTION OF LACK OF ARTICLE III JURISDICTION BY INTERVENOR DEFENDANTS FARM BUREAU, ROTH FARMS, K.W.B. FARMS

(FILED AUG 22, 1991)

THIS CAUSE is before the Court on the United States' Motion, pursuant to Fed. R. Civ. P. 12(f), to Strike the "Suggestion of Lack of Article III Jurisdiction" filed by Intervenor Defendants Farm Bureau, Roth Farms, and K.W.B. Farms ("Farm Bureau").

In its opinion granting the Farm Bureau intervention as to Count I of the United States' Amended Complaint, the Eleventh Circuit limited intervention to the development of numeric water quality standards. *United States v. South Florida Water Management District*, 922 F.2d 704 (11th Cir. 1991). Despite this limited grant of intervention, the Farm Bureau subsequently filed with the Eleventh Circuit a "Suggestion and Motion as to Lack of Federal Jurisdiction," in which the Farm Bureau requested dismissal of the entire case. In denying this motion, the Eleventh Circuit stated:

> As we have held in our opinion in the underlying appeal, the Farm Interests may intervene in this case to protect their right to participate in the development of numeric limits implementing the state's narrative water quality standards. The jurisdictional issues that the Farm Interests raise in their motion are only indirectly related to the protection of this right. Further, the Farm Interests are adequately represented by the defendants South Florida Water District and Florida Department of Environmental Regulation, which have already raised many of these issues with the District Court.
>
> The Farm Interests may still seek to present their jurisdictional motion to the District Court. If they choose this step, they will be well advised to ask the District Court's permission first. As we have stated, the District Court may condition the Farm Interests' intervention in this case on such terms as will be consistent with the fair, prompt conduct of this litigation. This authority allows the District Court to dispose in summary fashion (as we have done here) of any motions that the Farm Interests may file beyond

the scope of their right to participate in these proceedings.

United States v. South Florida Water Management District, (11th Cir. March 22, 1991).

The Suggestion filed with this Court, even more so than that presented to the Eleventh Circuit, constitutes a broad attack on the Court's jurisdiction over the entire underlying proceeding. As such, it greatly exceeds the limited scope of intervention granted by the Eleventh Circuit. This Court's Order of July 9, 1991, implementing the mandate of the Eleventh Circuit should be construed by all parties to this case as granting the Farm Interests intervention no broader in scope than that recognized by the court of appeals as necessary to protect the Farm Interests' right to participate in the development of numeric water quality standards. Accordingly, it is

ORDERED AND ADJUDGED that the motion to strike the Farm Bureau's Suggestion of Lack of Article III Jurisdiction is GRANTED.

DONE AND ORDERED in chambers at Miami, Florida this 22nd day of August, 1991.

/s/ William M. Hoeveler
WILLIAM M. HOEVELER
United States District Judge

cc: All counsel of record